

Case No. 5:13-CR-3

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possession of a firearm and has three or more prior convictions for a violent felony or serious drug offense.⁴ Barclay's pre-sentence report identified six possible predicate offenses.⁵

This Court found that Barclay qualified as an armed career criminal under the ACCA. This Court did not identify the specific predicate offenses, but rather relied on the "large number of crimes of violence or drug trafficking offenses."⁶

The Supreme Court's recent opinion in *Johnson v. United States*⁷ has thrown into question whether certain prior felonies can be counted as "violent felonies" for the purposes of the ACCA. The Supreme Court has held that *Johnson* applies retroactively to habeas claims challenging ACCA sentences.⁸

On November 19, 2015, Barclay filed a § 2255 motion seeking relief through habeas corpus.⁹ He argued that after *Johnson* he no longer had three ACCA predicate offenses.

This Court denied Barclay's motion.¹⁰ This Court determined that Barclay had at least three remaining ACCA predicate convictions: his 2005 trafficking conviction, his 1998 aggravated assault conviction, and his 1986 aggravated burglary conviction.¹¹ These convictions were sufficient to support his 2013 sentence under the ACCA.

On July 21, 2016, Defendant Barclay filed this motion for reconsideration under [Federal Rule of Civil Procedure 59\(e\)](#).¹² Barclay says that the Sixth Circuit recently concluded that Ohio's aggravated burglary statute does not qualify as an ACCA predicate offense.¹³

⁴ [18 U.S.C. § 924\(e\)\(1\)](#).

⁵ Doc. [27](#) at ¶¶ 41-61.

⁶ Doc. [42](#) at 3.

⁷ [U.S. , 135 S.Ct. 2551 \(2015\)](#).

⁸ [Welch v. United States, U.S. , 136 S.Ct. 1257 \(2016\)](#).

⁹ Doc [46](#).

¹⁰ Doc. [57](#).

¹¹ *Id.* at 4-5.

¹² Doc. [59](#).

¹³ *Id.* Barclay points to [United States v. Fountain, 643 F. App'x. 543, 547-48 \(6th Cir. 2016\)](#) (unreported).

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Consequently, Barclay asks this Court to reconsider whether his aggravated burglary conviction qualifies as an ACCA predicate offense.

II. Analysis

Defendant Barclay moves this Court to alter or amend its judgement denying his § 2255 motion. Under Rule 59(e), a court may grant a motion to amend or alter its judgment if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) manifest injustice.¹⁴ But, a reconsideration motion is not an opportunity to re-litigate previously decided matters or present the case under new theories.¹⁵ Such a motion is extraordinary and sparingly granted.¹⁶

Barclay says that the Sixth Circuit's decision in *United States v. Fountain*¹⁷ changed controlling law. He argues that the *Fountain* court determined that convictions under Ohio's aggravated burglary statute cannot qualify as ACCA predicate offenses.¹⁸ This argument loses.

In *Fountain*, the Sixth Circuit stated that a district court had "correctly labeled Ohio's aggravated-burglary statute non-generic, i.e., broader than generic burglary."¹⁹ Critically, the court then noted that "[b]ecause Ohio's statute is 'divisible'—in that it sets out one or more elements in the alternative—the court could have then employed a 'modified categorical approach' . . . to determine which alternative necessarily formed the basis of Fountain's prior conviction."²⁰

¹⁴ *Gencorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir.1999).

¹⁵ See *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir.1998).

¹⁶ *Plaskon Elec. Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, 669 (N.D. Ohio 1995).

¹⁷ 643 F. App'x at 547–48.

¹⁸ Doc. 59.

¹⁹ *Fountain*, 643 F. App'x at 547.

²⁰ *Id.*

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The modified categorical approach requires courts to determine the exact subsection of a divisible statute under which a defendant was convicted.²¹ If that subsection defines a crime more broadly than the generic definition of that crime, then the conviction cannot qualify as an ACCA predicate offense.²²

Defendant Barclay was convicted of “[a]ggravated burglary, [Ohio Revised Code Section 2911.11\(A\)\(3\)](#).”²³ When it denied Barclay’s § 2255 motion, this Court completed a modified categorical analysis of Ohio’s aggravated burglary statute.²⁴ This Court concluded that subsection (A)(3) of this statute is not overly broad.²⁵ As a result, Barclay’s aggravated burglary conviction qualifies as an ACCA predicate offense.

No conflict exists between *Fountain* and this Court’s previous denial of Barclay’s § 2255 motion. This Court followed the Sixth Circuit’s direction by “employ[ing] a ‘modified categorical approach’ . . . to determine which alternative [subsection] necessarily formed the basis of [the Defendant’s] conviction.”²⁶

The controlling law has not changed. Defendant Barclay still has at least three predicate offenses qualifying him for ACCA sentencing. His motion for reconsideration is denied.

²¹ [Descamps v. United States](#), ___ U.S. ___, 133 S. Ct. 2276, 2281 (2013).

²² *Id.*

²³ Doc. [53-1](#).

²⁴ Doc [57](#) at 13-18.

²⁵ *Id.* at 18.

²⁶ *United States v. Fountain*, 643 F. App’x. 543, 547–548 (6th Cir. 2016) (unreported). Doc [57](#) at 13-18.

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III. Conclusion

For the reasons stated in this opinion, this Court **DENIES** Defendant Barclay's motion for reconsideration. This Court certifies that Barclay could, in good faith, take an appeal on the question of whether aggravated burglary is a predicate offense under the ACCA.

IT IS SO ORDERED.

Dated: August 26, 2016

s/ James S. Gwin

JAMES S. GWIN
UNITED STATES DISTRICT JUDGE